

**UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE**

**LISA DESOMBRE, a natural guardian of
A.H., a minor**

Plaintiff

V.

KB TOYS, INC., d/b/a KB TOYS

Defendant

C.A. No.: 07-CV-22

PROPOSED ORDER

AND NOW, this day of , 2008, upon consideration of Plaintiff, Lisa Desombre's Response in Opposition to Defendant KB Toys, Inc's Motion in Limine to preclude Plaintiff's Expert Testimony, it is hereby **ORDERED** and **DECREED** that said Motion is Denied.

IT IS SO ORDERED.

BY THE COURT:

J.

**UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE**

**LISA DESOMBRE, a natural guardian of
A.H., a minor**

Plaintiff

v.

KB TOYS, INC., d/b/a KB TOYS

Defendant

C.A. No.: 07-CV-22

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION IN LIMINE

AND NOW, come Plaintiff, Lisa Desombre, a natural guardian of AH, a minor, by and through her undersigned attorney, Marc H. Snyder, Esquire, files this Opposition to Defendant's Motion in Limine to exclude Plaintiff's Expert Testimony, and in support thereof aver as follows:

1. Admitted. By way of further answer, the minor-plaintiff, now age-8, incurred a closed head injury when a metal hammer fell several feet from the top of a toy costume box, onto the minor-plaintiff's head. He continues to suffer from residual symptoms, including headaches and facial tics.

2. Admitted.

3. Denied. By way of further answer, on November 5, 2007, the undersigned provided defendant's counsel with all of the minor-plaintiff's, to-date, medical records (including records from a pediatrician, neurologist, and two neuropsychologists). Additional medical records were provided to defendant on April 28, 2008.

On November 8, 2007, Ms. Desombre testified at her deposition that she was attempting to

secure an appointment date, for her son to see a specialist in New York City. (Plaintiff's deposition transcript, pp. 49-50, attached as Exhibit "A.").

Shortly thereafter, Ms. Desombre informed the undersigned that she was taking her son to see Dr. Sidhu, a pediatric neurologist, in New York. Dr. Sidhu was identified in plaintiff's discovery answers, as a (potential) medical provider. (See Exhibit "B."). Over the next few months, Ms. Desombre informed the undersigned of her difficulty in securing an appointment with Dr. Sidhu. Defendant was kept apprised of plaintiff's difficulties in getting a timely appointment date with Dr. Sidhu.

It is the undersigned's understanding that in or about May or early June 2008, Ms. Desombre was able to get an appointment for her son to see Dr. Sidhu. The undersigned has to-date been unable to secure any kind of office note, or report, from Dr. Sidhu, relating to her examination of the minor-plaintiff. Defendant's counsel was also kept apprised of the undersigned's inability to get a timely report from Dr. Sidhu.

In June 2008, due to plaintiff's inability to get a report from Dr. Sidhu, plaintiff scheduled the minor-plaintiff for a consultative neurological examination with Dr. Bruce Grossinger, a board certified neurologist. The earliest available date for Dr. Grossinger to see the minor-plaintiff was on July 8, 2008. On July 22, 2008, Dr. Grossinger prepared a narrative report secondary to his exam of the minor-plaintiff, and a review of the above-referenced medical records. Via letter dated July 24, 2008, Dr. Grossinger was identified as plaintiff's expert witness, and his report was provided to defendant's counsel. (See Exhibit "C").

4. It is admitted that a mediation is scheduled for August 5, 2008. However, it is the pre-trial conference - and not the trial - which is schedule to commence on December 4, 2008. In accordance with the court's scheduling order, trial will be scheduled at the pre-trial to commence

within 120 days of the date of the conference.

It is also denied that defendant's are prejudiced by plaintiff's (23 day) late identification of an her expert witness. As stated herein, plaintiff has encountered difficulties in getting her son the proper medical care. Her son has been seen by specialists in Delaware, Philadelphia and New York.

Defendant has been kept apprised of plaintiff's difficulties in securing a report, and thus timely identifying an expert witness. It was only after the minor-plaintiff's appointment with Dr. Grossinger on July 8, 2008, did plaintiff have the requisite report with which to base expert testimony. In the Third Circuit, four factors must be considered when determining whether to exclude a witness from testifying: "(1) the prejudice or surprise in fact to the opposing party, (2) the ability of the party to cure the prejudice, (3) the extent of disruption of the orderly and efficient trial of the case, and (4) the bad faith or willfulness of the non-compliance." Greate Bay Hotel & Casino v. Tose, 34 F.3d 1227, 1236 (3d Cir. 1994) (citing Beissel v. Pittsburgh and Lake Erie R. Co., 801 F.2d 143, 150 (3d Cir. 1986)).

In the instant matter, there is no prejudice nor surprise to defendant in plaintiff's late identification of her expert witness. Moreover, the pretrial conference is more than four months from now, and defendant has ample time to schedule the minor-plaintiff for an independent medical examination.¹

¹ In or about May 2008, defendant's counsel requested minor-plaintiff's availability for a proposed IME. The undersigned informed counsel that Ms. Desombre would avail minor-plaintiff for an exam on a mutually convenient date and time.

Respectfully Submitted,

By: /s/ Marc H. Snyder
MARC H. SNYDER, ESQUIRE (#3791)
Rosen, Moss, Snyder & Bleefeld, L.L.P.
1813 Marsh Road, Suite D
Wilmington, DE 19810
Attorney for Plaintiffs

**UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE**

**LISA DESOMBRE, a natural guardian of
A.H., a minor**

Plaintiff

v.

KB TOYS, INC., d/b/a KB TOYS

Defendant

C.A. No.: 07-CV-22

CERTIFICATE OF SERVICE

I, Marc H. Snyder, Esquire, do hereby certify that on this 28th day of July, 2008 a copy of the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION IN LIMINE TO PRECLUDE PLAINTIFF'S EXPERT TESTIMONY** was delivered via First Class Mail, postage prepaid and/or E-File and Serve upon:

Daniel L. McKenty, Esquire
Heckler & Frabizzio
The Corporate Plaza
800 Delaware Avenue, Suite 200
P.O. Box 128
Wilmington, DE 19899-0128

ROSEN, MOSS, SNYDER & BLEEFELD, L.L.P.

By: /s/ Marc H. Snyder
MARC H. SNYDER, ESQUIRE (#3791)
Rosen, Moss, Snyder & Bleefeld, L.L.P.
1813 Marsh Road, Suite D
Wilmington, DE 19810
Attorney for Plaintiff
(302) 475-8060

LISA DESOMBRE

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1 report. I'm not sure if she needed me to get -- I gave
2 her teacher evaluations on A.J. from his kindergarten,
3 first grade teachers, and second grade teacher.

4 I don't know if she's referring to maybe if
5 she wanted to get more things from me. I don't know if
6 she wanted any other records other than that, but I didn't
7 request that a report be postponed. So that's news to me.

8 Now, when she referred me to Dr.
9 Massari, she felt that he could do -- I do remember that
10 she felt he could do more testing; that he had more
11 ability to do more testing. So I'm not sure if that's
12 what she's talking about. Do you know?

13 MR. SNYDER: (Shrugs shoulders.)

14 BY MR. HAGER:

15 Q. He doesn't get to answer. Did you read Dr.
16 Massari's report?

17 A. Yes, I did.

18 Q. And you agree with what he says there?

19 A. No. He saw A.J. for a couple of hours and both
20 with Dr. Nicodemus and Dr. Massari, I was asked not to be
21 in the room. So it does explain in the report some of the
22 testing but I didn't see the testing.

23 But my belief is it takes more time seeing
24 a child to come up with a complete, accurate report. So I
25 will be taking A.J. to a specialist in New York that was

LISA DESOMBRE

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1 recommended to me.

2 Q. And who's that?

3 A. I don't have his name with me but I can get
4 that --

5 Q. Do you have it scheduled?

6 A. -- to Marc and he can get it to you.

7 Q. Is it scheduled, the appointment?

8 A. No. It's just that somebody has recently told
9 me about somebody that they know that is very good there.

10 Q. Who? Who are the somebodies.

11 A. Oh, my ex-husband who lives in New York City.
12 He's a squash pro and sees a lot of sports injuries and so
13 in particular for head injuries, he knows of somebody
14 good.

15 Q. Does your ex-husband have visitation rights,
16 joint custody, how's that?

17 A. I have one daughter with my ex-husband,
18 Natasha, and yes. We have joint custody and...

19 Q. So he was just -- because you're still in
20 contact?

21 A. Right, right. We're good friends.

22 Q. So you're not satisfied with Dr. Massari's
23 report? You're waiting to get someone else to look at
24 him?

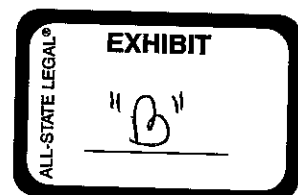
25 A. Right. I would like to find someone that can

UNITED STATE DISTRICT COURT
DISTRICT OF DELAWARE

LISA DESOMBRE, a natural guardian)	
of A.H. a minor,)	
)	
Plaintiff,)	C.A. No.: 07-CV-00022 (JJF)
)	
v.)	
)	
KB TOYS, INC., d/b/a KB TOYS,)	TRIAL BY JURY OF 12
)	DEMANDED
Defendant.)	

**PLAINTIFF'S RESPONSE TO DEFENDANT K.B. TOY'S INC. FIRST SET OF
INTERROGATORIES**

- 1.) Anthony James Hunt, 8, 200-78-3798.
- 2.) Brain, Head Injury, Trauma
- 3.) No
- 4.) A.J. Hunt has irregular head movements, eye blinking, "zoning -out", seizures, memory problems, problems with focus and concentration, and frequent headaches. He did not have any these problems prior to this accident.
- 5.) John Jay Lubwicki, Lewes Pediatrics, 33759 Clay Road, Lewes, Delaware 19958.
Dr. Bradley, Beebe Medical Center, 424, Savannah Road, Lewes, Delaware 19958.
Margarita Meehan, M.D., The Children's Hospital of Philadelphia, 34th Street & Civic Center Blvd., Philadelphia, PA 19104.
David J. Massari, Ph.D., Clinical Neuropsychology Associates, Architect's Building, Suite 1700, 117 South 17th Street, Philadelphia, PA 19103.
Katherine M. Nichodemus, Psy.D., 16529 Costal Highway, Suite 113, Lewes, DE 19958.
Kathleen Zsolway, M.D., Faculty Practice, 3550 Market Street, 4th Floor, Philadelphia, PA 19104.
Dr. Sidhu, 710 West 168th Street, New York, NY 10032
- 6.) See Response to #5
- 7.) See Medical Specials
- 8.) See Medical Specials
- 9.) The accident occurred on Saturday, January 15, 2005 and he was confined to bed on the



ROSEN, MOSS, SNYDER
& BLEEFELD, L.L.P.

Attorneys at Law

MARC H. SNYDER
EMAIL: msnyder@rmsblaw.com

* MEMBER PA BAR
+ MEMBER NJ BAR
† MEMBER DE BAR

1813 MARSH ROAD
SUITE D
WILMINGTON, DELAWARE 19810
(302) 475-8060
FAX NO. (302) 475-8182

NEW JERSEY OFFICE

1103 LAUREL OAK ROAD
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(856) 784-9222
FAX NO. (856) 784-9224

PHILADELPHIA OFFICE

8380 OLD YORK ROAD
SUITE 410
ELKINS PARK, PA 19027
(215) 935-0315
FAX NO. (215) 935-0326

BRISTOL OFFICE

132 MILL STREET
BRISTOL, PENNSYLVANIA 19007
(215) 935-0315
FAX NO. (215) 935-0326

July 24, 2008

Via Fax Only: 302-573-4806

Daniel McKenty, Esquire
800 Delaware Avenue, Suite 200
P.O. Box 128
Wilmington, DE 19899


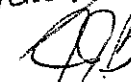
RE: Desombre v. KB Toys

Dear Dan:

I enclose a copy of the expert medical report of Dr. Bruce Grossinger, dated July 8, 2008, and Dr. Grossinger's curriculum vitae.

Thank you for your attention.

Very truly yours,


MARC H. SNYDER 

MHS/jjb
Enclosure(s)



TRANSMISSION VERIFICATION REPORT

TIME : 07/24/2008 10:34
NAME : ROSEN MOSS SNYDER BL
FAX : 2159350326
TEL : 2159350315
SER.# : BROM5J412221

DATE, TIME 07/24 10:33
FAX NO./NAME 13025734806
DURATION 00:00:54
PAGE(S) 08
RESULT OK
MODE STANDARD
ECM

ROSEN, MOSS, SNYDER
& BLEEFELD, L.L.P.

Attorneys at Law

MARC H. SNYDER
EMAIL: msnyder@rmseblaw.com

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+ MEMBER NJ BAR
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July 24, 2008

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Daniel McKenty, Esquire
800 Delaware Avenue, Suite 200
P.O. Box 128
Wilmington, DE 19899

RE: Desombre v. KB Toys

Dear Dan:

I enclose a copy of the expert medical report of Dr. Bruce Grossinger, dated July 8, 2008, and Dr. Grossinger's curriculum vitae.

Arbor Point Professional Center
4100 Dawnbrooke Drive, Suite 4
Wilmington, DE 19804
(302)636-0920
FAX (302) 636-0924



Ridley Park Medical Center
23 Chester Pike, Suite 301
Ridley Park, PA 19078
(610) 521-6063
FAX (610) 521-6419

CLINICAL NEUROLOGY NEEDLE ELECTROMYOGRAPHY (EMG) PAIN MANAGEMENT

Bruce H. Grossinger, D.O. CIME

Steven D. Grossinger, D.O. CIME



American Board of Psychiatry and Neurology
American Board of Independent Medical Examiners
American Board of Electrodiagnostic Medicine
American Board of Pain Medicine
American Academy of Pain Management
American Board of Psychiatry and Neurology:
Subspecialty Certification in Pain Medicine



MAIL ALL CORRESPONDENCE TO: P.O. BOX 199, RIDLEY PARK, PA 19078

July 8, 2008

Mark Snyder, Esq.
8380 Old York Road
Suite 410
Elkins Park, PA 19027

RE: A.J. Hunt, A Minor

Dear Mr. Snyder:

Please be advised that I have completed a comprehensive neurological evaluation on your client, A.J. Hunt, A Minor. I have reviewed all of the enclosed records, and examined the patient in the presence of his mother. A.J. Hunt is an 8-year-old boy who was struck in the head with a hammer at KBtoys in Dover, DE on 1/15/05. His chief complaint is moderate to severe headaches 4-5 times per week. The headaches typically occur at the site of the strike to the head.

RE: A.J. Hunt, A Minor

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July 8, 2008

I asked the boy to describe the event in his own words. He stated that a big hammer fell and struck him on the top of the head. The force drove him to the ground, though he did not fully lose consciousness. Following these events, he was very upset, and was comforted by his mother. He had a large welt on the top of his scalp with associated swelling. His aunt, who is a registered nurse, monitored him carefully with neuro checks over the ensuing hours. His mother initially believed that his symptoms would abate, though because he was "not his normal self," she sought the advice of a pediatrician.

I asked him about his current symptoms. He notes headaches lasting for minutes or hours, approximately 4-5 times weekly. He will take Advil. The pain is alternating between sharp and dull at the vertex of the head. There have been no witnessed seizures.

A.J. has three sisters. He had normal growth and development. He was tested as advanced in kindergarten, though his mother has noted a decline in his cognitive status.

I have reviewed the various records, including reports from Drs. Ludwicki, Bradley, Meehan, Massari, Nicodemus and Zsolway. A report from Dr. Ludwicki indicated that the reason for the visit was head trauma. Dr. Meehan, an attending pediatric neurologist in Springfield, noted that the hammer fell off and struck him. He was dazed and confused. He was described as having suffered a blow to the head without loss of consciousness. He could not draw definitive conclusions about causality. An EEG was within normal limits.

RE: A.J. Hunt, A Minor

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July 8, 2008

A neuropsychological evaluation was performed by Dr. Massari, and there were reports from the mother about diminished attention, school performance and headaches. Dr. Massari diagnosed a closed head trauma with some attentional difficulties involving motor restlessness and impulsiveness. Thankfully, despite his problems, he was described as a bright youngster.

PHYSICAL EXAMINATION

On examination, the patient appears to speak in a slow and hesitant manner. After a time, his shyness abates. There is some evidence of repetitive eye blinking and facial tics. He is able to name objects. His calculation function is normal. He is able to follow 4-part commands across the midline.

Cranial nerve analysis reveals pupils which are equally reactive to light and accommodation. His extraocular movements are intact. Facial strength and sensation is normal.

Manual motor power, deep tendon reflexes, coordination and gait are normal.

CONCLUSIONS

This patient has permanent neurological injuries which are directly referable to a strike on the head on or about 1/15/05. The description of a hammer striking him on the top of the head is sufficient to produce the mechanism of injury, as described. He has been diagnosed with a concussion syndrome, closed head injury, scalp contusion and, most importantly, intractable

RE: A.J. Hunt, A Minor

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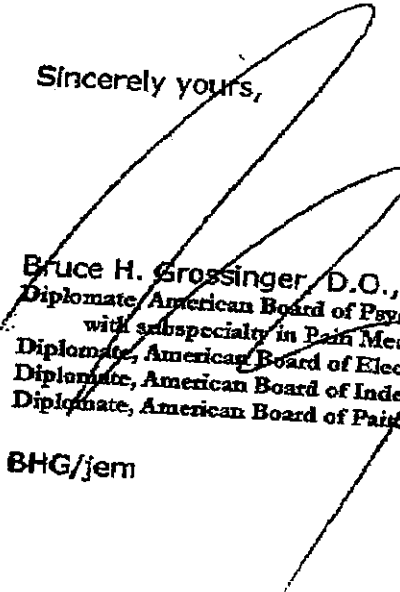
July 8, 2008

headaches. An initial neck strain appears to have abated. I concur with Dr. Massari that he has some inattention along with his headaches and motor restlessness, relating to his accident of 1/15/05. Thankfully, his overall high intelligence has allowed him to compensate with respect to his academic performance and formal neuropsychological testing.

Future treatment will include Advil. When he becomes a young adult, there will be opportunity for him to be treated with various combination analgesics and serotonin-based receptor agonists. I have not identified any contributing factors other than the strike to the head.

The opinions in this report are rendered within a reasonable degree of medical certainty.

Sincerely yours,


Bruce H. Grossinger, D.O., CIME (certified Independent medical examiner)
Diplomate, American Board of Psychiatry and Neurology
with subspecialty in Pain Medicine
Diplomate, American Board of Electrodiagnostic Medicine
Diplomate, American Board of Independent Medical Examiners
Diplomate, American Board of Pain Medicine

BHG/jem

CURRICULUM VITAE

BRUCE GROSSINGER, D. O.
23 Chester Pike
Suite 301
Ridley Park, PA 19078
(610) 521-6063

BIRTHPLACE: Philadelphia, PA, May 15, 1959

EDUCATION: Lehigh University Phila. College of Osteopathic Medicine
Bethlehem, PA Philadelphia, PA
B.A. 1981 Doctor of Osteopathy, June 1985
Magna Cum Laude

POSTGRADUATE TRAINING: Intern
Metropolitan Hospital
Philadelphia, PA
July, 1985 - June, 1986

Chief Resident
Neurology Department of the
New York Medical College
Valhalla, NY - July, 1986 - June, 1989

Clinical Neurodiagnostics Fellowship
EEG, EMG, Evoked Potentials, Polysomnography,
Video/EEG Monitoring Humana University Hospital
and Veterans Administration Hospital
Kosair Children's Hospital
University of Louisville Neurology Department
Louisville, KY - July, 1989 - June, 1990

Condensed Fellowship in Magnetic Resonance Imaging
American Society of Neuroimaging
January 2002

HONORS AND AWARDS: Awarded undergraduate research grant for two year
study of "Transduction of Microorganisms" with
Barry Bean, Ph.D., Associate Professor of Biology,
Lehigh University

Dean's List: Freshman Honors:
Henry Farmer Premedical Scholarship
Lehigh University Trustee Scholarship

Principle speaker on Neurology, French Medical Program,
Lincoln Hospital Center - June, 1987

Bruce H. Grossinger, D.O.

Page 2

**EMPLOYMENT
HISTORY:**

Physiologic research with Dr. Eugene Lentini
Work involved quantifying cardiac enzyme
concentrations of rat papillary muscle tissue, 1981

Cardiopulmonary Resuscitation Instructor for the
American Heart Association with eligibility to teach
Advanced Cardiac Life Support

LICENSES:

Licensed to practice in Pennsylvania and Delaware
Board Certified in American Board of Psychiatry
and Neurology, 1992
Board Certified in American Board of Electrodiagnostic
Medicine, 1997
American Board of Pain Medicine, Diplomate 2004.

**WORKERS COMP
PANEL NEUROLOGIST**

Boeing Corporation
Amtrak
ConRail
United States Department of Defense
United State Department of Labor
General Motors
Park Care Industrial Health
Crozer Centers for Occupational Health
Mercy Work Care
Company Neurologist, Daimler Chrysler Assembly Plant

**HOSPITAL
AFFILIATIONS:**

Taylor Hospital, Co-Chief Neurology Section
1997 - present
Taylor Hospital, Director EEG Laboratory
Services, Active privileges, 1990 - present
Crozer-Chester Medical Center, Active
privileges, 1990 - present
Riddle Memorial Hospital, Active privileges,
1990 - present
Allegheny University Hospital, Assistant Clinical Professor
1996 - present

ASSOCIATIONS:

Member of America College of
Osteopathic Pain Management &
Sclerotherapeutic Pain Management, Inc. 2003-
American Academy of Neurology, 1987 -
Member of Multiple Sclerosis Society, 1987 -
American Osteopathic Association, 1981 -
American Medical Association, 1988 -
President, Sigma Alpha Mu Fraternity Pledge Class:
Lehigh University, 1981

Bruce H. Grossinger, D.O.

Page 3

**PUBLICATIONS/
PRESENTATIONS:**

Bean B, Savitsky R, Grossinger BH: Strontium Ion (Sr++) Induces Backward Swimming of Chlamydomonas. J. Protozoal. Vol. 29, No. 2. (ab 83), May, 1982

Koppel B, Tuchman, A, Daras M, Grossinger BH: Alcoholism in City Hospital Patients: An analysis of alcohol-associated seizures focusing on clinical presentation, compliances, efficacy of anticonvulsants, and EEG correlates. Presented as a poster at the International Symposium of Alcohol and Seizures, Washington, D.C., September, 1988

**MANUSCRIPTS IN
PREPARATION:**

Electroencephalographic Changes During the Course of Treatment of Intractable Neoplasms with Tissue Necrosis Factor-Singh B., Grossinger BH, Needleman D

Comparative Efficacy of Multiple Sensory Threshold Modalities in Assessment of Peripheral Neuropathy Patients with Normal Conventional EMG/NCV Tests - Grossinger BH, Iyer V, Shuplam R, Seipel J

Case Report of Coexistent Diabetic Thoracolumbar Polyradiculopathy and Postherpetic Neuralgia Presenting as Regional Dysaesthesia - Grossinger BH, Shupalam R., Iyer V

REFERENCES:

Available upon request